

Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*

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The so-called revolution in American conflicts law, at least in its avant-garde version of governmental interest analysis, has not only subsided by now but has been almost overcome by an equally forceful counter-revolution. Indeed, one fears that the very purpose of this Symposium is to pronounce the death of the former and the victory of the latter. Dead or not, the conflicts revolution has, both in victory and defeat, taught us some valuable lessons which its critics are all but ready to forget. The most important lesson can be derived from the revolution's own gravest error: a holistic, all-or-nothing mentality best exemplified in the often quoted statement of the revolution's chief protagonist, Professor Brainerd Currie, urging that the *entire* traditional conflicts system be "scrap[ped] . . . without entertaining vain hopes that a new 'system' will arise to take its place."¹ Although this statement sounds more extreme today than it did when made, it should have been as clear then as it is now that what the system needed was a benign, quiet evolution rather than a violent revolution. Fortunately, neither the system nor the revolution was scrapped. This was true at least until today, when the revolution's critics² appear ready to scrap it without even retaining some of its components to be used as spare parts in the ongoing and much needed process of renovating the American conflicts system. Repeating Currie's excesses, some of these critics denounce interest analysis in the same holistic and indiscriminating fashion³ in which he had rejected the traditional system and often

* Copyright 1985 by Symeon Symeonides. This is an abridged excerpt from a longer work which is to appear shortly in the Louisiana Law Review. Acknowledgments for the title are due to Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966). Professor Ehrenzweig was a revolutionary before the revolution and a counter-revolutionary during the revolution.

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1. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 185 (1963).

2. Since its inception in the early 1960's, interest analysis has had as many critics as it has had adherents. For early criticisms in this country see, *inter alia*, Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 641 (1968); Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?* 1 HOFSTRA L. REV. 93 (1973); von Mehren, Book Review, 17 J. LEGAL ED. 91 (1964). For early European criticisms see Evrigenis, *Tendances Doctrinales Actuelles en Droit International Prive*, 118 RECUEIL DES COURS 313 (1966); Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91 (1964). In recent years, criticisms of interest analysis have multiplied. Among the most outspoken recently published critiques are Bodenheimer, *The Need for a Reorientation in American Conflicts Law*, 29 HASTINGS L.J. 731 (1978); Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 556 (1984); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1983); Hay, *Reflections on Conflict-of-Laws Methodology: A Dialogue*, 32 HASTINGS L.J. 1644 (1981); Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889 (1981); Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981); Trautman, *Reflections on Conflict-of-Law Methodology: A Dialogue*, 32 HASTINGS L.J. 1609 (1981); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981).

3. See, e.g., Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, *supra* note 2, at 556

paint with a brush which is broad enough to sweep away many other policy-oriented approaches to choice of law.⁴

This Article takes issue with this all-or-nothing, "with-us-or-against-us" attitude of the critics of interest analysis. However, this is not an article in defense of interest analysis which is, after all, so eloquently defended by others.⁵ Prosaic as this may sound, interest analysis is neither to be renounced nor espoused *in toto*. And, if forced to choose, this writer would have little difficulty opting for the former rather than the latter choice. Fortunately, however, and despite the purism of both interest analysts and their critics, no such wholesale choice is forced upon us. Conceding that interest analysis, as conceived by Currie, has *by now* exhausted its utility as a *self-contained* choice of law methodology does not and should not mean that interest analysis should be buried and forgotten. Many of the ideas introduced by and contained in interest analysis are still viable and have a lot to contribute to the renovation of American conflicts doctrine. If our objective is to move forward rather than backward, if our goal is revisionism rather than counter-revolution, these ideas must be identified and retained. The purpose of this Article is to distinguish between the tenable and the untenable ingredients of interest analysis and to seek a middle, and hopefully common, ground between the revolution and the counter-revolution. As middlemen are usually disliked by both sides, this writer expects little empathy from either interest analysts or their critics, but rather accusations from both for "unprincipled eclecticism" or "mishmash."⁶ Be that as it may, American conflicts law, like American common law in general, has less to fear from experimental eclecticism than from inflexible intellectual purism.

I. CURRIE'S DENOUNCEMENT OF CHOICE OF LAW RULES

The first symptom of Currie's holistic mentality was his wholesale rejection of the established conflicts system⁷ in favor of an entirely ad hoc approach.⁸ Although

("interest analysis is methodologically bankrupt"). The critics of interest analysis also refuse to consider the contributions of a whole new generation of scholars that have improved significantly on the original version of interest analysis. Among these scholars are Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 149 (1973); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977).

4. Most prominent among the modern policy-oriented approaches that may be endangered by indiscriminating attacks on interest analysis are the approaches of Cavers, von Mahren and Trautman, Weintraub, and McDougal. See D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (2d ed. 1980); McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 UCLA L. REV. 439 (1979). Although differing in many respects from interest analysis, the above approaches share with interest analysis a strong policy orientation and a great deal of functionalism; thus, they may be as susceptible as interest analysis to the attacks of its critics.

5. See, e.g., Allo, *Methods and Objectives in the Conflict of Laws: A Response*, 35 MERCER L. REV. 565 (1984); Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593 (1983); Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984); Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984).

6. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

7. See B. CURRIE, *supra* note 1, at 185: "[w]e would indeed do well to scrap the system of choice-of-law rules . . . without entertaining vain hopes that a new 'system' will arise to take its place."

8. See *id.* at 627:

[T]he method I advocate is the method of statutory construction, and of interpretation of common-law rules, to

his own research was confined mostly to the area of contracts and torts,⁹ Currie became genuinely convinced that the entire system embodied in the first conflicts Restatement¹⁰ was unworkable and should be "scrapped."¹¹ Had he stopped there, Currie would have had many followers until today. Instead, in a typical legal realist fashion, Currie pushed to the extreme by postulating that all rules are necessarily evil,¹² and by discouraging any efforts to develop new choice of law rules to replace the Restatement.¹³

That Currie overstated his case is obvious.¹⁴ What is less obvious is whether he did so intentionally. First, his wholesale rejection of all then existing choice of law rules was not only unjustified in light of his own rather limited research, but was also based on the false premise that such rules were incapable of expressing or effectuating governmental interests. The truth is that those rules did express governmental interests, albeit of the kind Currie did not like, and that different, narrower, more content-oriented, and less mechanical rules are capable of expressing and effectuating legitimate governmental interests. It goes without saying that, had he taken that view, Currie would probably have been a revisionist rather than a revolutionary. Second, Currie's denouncement of efforts to develop new choice of law rules was inconsistent with his own proud adherence to the common law method¹⁵ and, more particularly, the doctrine of stare decisis.¹⁶ It seems likely that, while excessive in intensity, Currie's rule-skepticism was rather temporary in scope. Currie was simply afraid that the premature formulation of new choice of law rules would arrest the development of his infant doctrine before it could be perfected by trial and error.¹⁷ It is highly

determine their applicability to mixed cases. While there are some general principles to guide us, statutory construction must always be an *ad hoc* process. The distinctive virtue of the common law system is that it also proceeds on an *ad hoc* basis. I am proud to associate myself with the common law tradition.

9. See Hill's criticism on this point in Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, *supra* note 2, at 463, 473, and Currie's response to it in B. CURRIE, *supra* note 1, at 586–89. See also Currie's own admission about fields he did not study, such as property, in Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1219, 1241 (1963).

10. RESTATEMENT OF CONFLICT OF LAWS (1934).

11. See B. CURRIE, *supra* note 7.

12. See B. CURRIE, *supra* note 1, at 180: "In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all." See also *id.* at 616: "I regard choice-of-law rules as an obstruction to clear analysis and hence to progress." See also *id.* at 183: "We would be better off without choice-of-law rules."

13. See Currie, *Comments on Babcock v. Jackson*, *supra* note 9, at 1219, 1241: "[N]ew efforts to find short cuts and syntheses should be sternly discouraged. We are beginning to recover from a long siege of intoxication resulting from overindulgence in generalities; for a while, at least, total abstinence should be enforced."

14. Cf. Rosenberg, *The Comeback of Choice of Law Rules*, *supra* note 2, at 946, 950: "Currie may have been as wrong in his all-out rejection of the utility of choice-of-law principles and rules as the old school was in its all-out worship of the mechanistic rules and the territorialist and vested rights dogmas that supported them."

15. See B. CURRIE, *supra* note 8.

16. Cf. Rosenberg, *The Comeback of Choice of Law Rules*, *supra* note 2, at 950: "[E]ven an *ad hoc* result oriented, do-justice approach creates precedents that must be followed; and inevitably this leads to the growth of rules of general applicability." Professor Sedler, one of Currie's staunchest defenders, maintains that interest analysis rejects only what he calls "choice-of-law rules," *i.e.*, rules formulated *a priori*, but not "rules of choice of law," *i.e.*, rules produced *a posteriori* through the normal workings of stare decisis. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 978, 983 (1977). While Sedler's view on this issue may represent the position of interest analysis today (see *infra* notes 20–23), it does not reflect accurately Currie's own thesis. See B. CURRIE, *supra* note 12. In the words of Professor Rosenberg, Currie "was against every last trace of rules for choice-of-law whether they came first or last." Rosenberg, *The Comeback of Choice of Law Rules*, *supra* note 2, at 950.

17. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963): "Quite apart from what

probable that, had he lived longer, Currie would have either overcome these fears or he would have been so disillusioned by the anarchy unleashed by his revolution that he would have resorted to the certainty of new choice of law rules.¹⁸

The time has come for interest analysts to renounce Currie's sterile attitude toward legal rules and to work for the development of new choice of law rules that will avoid the shortcomings of the old—so effectively demonstrated by Currie—and that will incorporate as much as necessary of the new teachings. After twenty years of experimentation with ad hoc approaches, there is enough uncertainty to make such rules necessary and sufficient accumulation of experience to make them feasible. Despite suggestions to the contrary,¹⁹ policy-oriented approaches, including interest analysis, are susceptible of being compressed into narrow, content-oriented rules, provided one is willing to sacrifice some revolutionary purity. Professors Cavers,²⁰ Sedler,²¹ Weintraub²² and Judge Fuld²³ have already formulated such rules or principles, and, despite what one might think, legislatures are not far behind.²⁴ Although far from perfect, these rules represent the current state of the revolution in its strive for maturity and deserve the attention of the critics as much as did the original version of interest analysis.

II. THE DOMESTICATION OF THE CHOICE OF LAW PROCESS

To fill the vacuum left by his rejection of the rules and the conflictual method²⁵ of the Restatement, Currie resorted, like Cook, to the method of statutory construction

I believe to be the inherent futility of such an undertaking, deep-freezing seems hardly the indicated treatment for a discipline just emerging from its Ice Age." See also, Currie, *supra* note 13.

18. Compare the authoritative statement of Justice Traynor: "I welcome the search of scholars for *a priori* principles, despite misgivings as to those that have thus far been proposed." Traynor, *War and Peace in the Conflict of Laws*, 25 INT'L & COMP. L.Q. 121, 127 (1976). See also Cavers' parallel experience in note 20 *infra*.

19. For the notion that interest analysis is incapable of producing any rules because it is based on the content of competing laws and their underlying policies which will usually differ from case to case, see Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971): "The problem is made more acute by the fact that either different policies, or policies of different intensity, may underlie the identically worded statutes or decisional rules of two or more states. As a result, a decision involving a statute or rule of one state will not be a conclusive precedent in a case involving even an identically worded statute or rule of another state."

20. Himself one of the precursors of the revolution as early as 1933, Cavers grew progressively tired of the uncertainty generated by the new approaches, and, in 1965, he proposed five "principles of preference" for torts and one for contracts. See D. CAVERS, *supra* note 4, at 139-81 (1965). See also his one principle for products liability in Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703 (1977).

21. See Sedler's nine rules for torts cases in Sedler, *supra* note 16, at 1033-41.

22. See Weintraub's rules for torts and contracts in R. WEINTRAUB, *supra* note 4, at 346, 382.

23. See Judge Fuld's three rules for guest statute cases in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 254, 335 N.Y.S.2d 64 (1972).

24. For instance, the newly enacted statutes on quasi-community are good examples of modern choice of law rules of the kind that would please many contemporary conflicts theorists. See, e.g., CAL. PROB. CODE §§ 66, 101, 102, 120 (Deering 1983); TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1981); Uniform Distribution of Community Property Rights at Death Act § 3 (adopted in 8 states). Louisiana is currently engaged in a comprehensive codification of its conflicts law, and this writer has the privilege of serving as Reporter for this project.

25. The term "conflictual method" is used in Europe to denote the classic method of private international law which relies on indicative rules, i.e., choice of law rules which do not technically dispose of the merits of a multistate dispute but simply indicate the legal order that would furnish the applicable substantive law. The conflictual method presupposes a sharp division between substantive and conflicts law, proceeds on *a priori* rules which select the applicable law without regard to its content, and aims at conflicts justice more than at substantive justice.

and interpretation employed by courts in fully domestic cases.²⁶ In Currie's words, "[j]ust as we determine by that process how a statute applies in time, and how it applies to marginal cases, so we may determine how it should be applied to cases involving foreign elements."²⁷ Thus, rather than selecting the applicable law without regard to its content, Currie would, like Cavers, focus directly on the content of the substantive laws of the states implicated in the conflict. His ordinary process of construction and interpretation²⁸ would reveal the policies underlying those laws and would, in turn, determine their intended sphere of operation in space. There are three distinct though interrelated ideas in this feature of Currie's analysis which merit separate discussion. The first is the notion that the domestic process is at all capable of producing solutions to choice of law problems. The second is the notion that the ordinary method of interpretation can safely and efficiently pinpoint the policies underlying the competing substantive law rules, especially foreign ones. The third is the notion that the policies of a given rule of law may help determine its intended sphere of operation in space.

Currie's confidence that the domestic method is capable of producing adequate solutions to multistate problems is not necessarily unjustified,²⁹ *provided* that in employing this method one avoids the temptation that Currie did not avoid—assuming a narrow, ethnocentric perspective. Currie was by no means an iconoclast in rejecting the existence of an overarching legal order which delineates affirmatively and in advance the legislative jurisdiction of each state. His idea that, in searching for choice of law solutions, the forum should look inward rather than upward was not new.³⁰ In fact, Currie was unknowingly importing to this country the debate between nationalism and universalism³¹ and between unilateralism and bilateralism³² which for

26. See B. CURRIE, *supra* note 8.

27. B. CURRIE, *supra* note 1, at 184.

28. B. CURRIE, *supra* note 8.

29. Currie's critics charge that "domestic interpretation and conflicts interpretation are different enterprises altogether." See, e.g., Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 417. Indeed, they may have different objectives, but the *process* of interpreting cannot be too different. Rosenberg's charge that, by resorting to the domestic method, Currie "inescapably" implies that "the 'foreign elements' in a case do not call for a distinctive mode of refereeing," Rosenberg, *The Comeback of Choice of Law Rules*, *supra* note 2, at 947, may be a correct description of Currie's attitude, but it is by no means an inevitable proposition. It is not inconceivable that one may employ the domestic method, i.e., the teleological method of interpretation, and yet be guided by internationalistic motives with built-in mechanisms of self-refereeing, or, rather, self-restraint. In fact, even Currie recognized the existence of these restraints when he spoke of the forum's "rational altruism." See *infra* notes 86, 87. More puzzling is Professor Leflar's criticism, quoted with approval by Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 392 n.3, that "[t]he term 'statutory construction' is no more than a pretentious disguise for application of the court's conflicts law." Leflar, *Choice-of-law Statutes*, 44 TENN. L. REV. 951, 954 (1977). If the word conflicts was put there consciously, it is hard to see why the forum needs any disguise in applying its own *conflicts* law. If Professor Leflar meant to refer to the forum's *substantive* law, then the criticism is rather surprising, coming from a scholar whose "better-law approach" is potentially a much less thinly disguised euphemism for the application of the substantive law of the forum.

30. Cf. Traynor, *supra* note 18, at 122: "It is no longer possible to play super judge when there is no superlaw."

31. For a good presentation of the universalist and nationalist perceptions of private international law in Europe around the turn of the century, see De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 RECUEIL DES COURS 435, 452-64, 471-77 (1966). The European nationalists eventually won the day, but they were much less ethnocentric than Currie. Nationalist theories surfaced in this country in the writings of W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942), and E. LORENTZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947). Currie simply continued that tradition.

32. For a comprehensive exposition of the new unilateralist approach to choice of law in Europe, see Gothot, *Le Renouveau de la Tendance Unilateraliste en Droit International Prive*, 60 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVE 1,

centuries had marked the European conflicts scene. This was refreshing for a country so long dominated by Bealian bilateralism and almost inevitable for a system characterized by hostility toward legislative solutions to choice of law problems. Disillusioned by Beale's conflictual method and unguided by legislative directives, it is not surprising that American judges turned an eager ear to Currie's call for a return to the familiar domestic method of interpretation. Besides filling the vacuum left by the collapse of Bealian systematics and taking the magic out of choice of law adjudication, the domestic method of interpretation has enriched the choice of law process by making available to it the vast resources of the domestic common law process.³³ It has also introduced functionalism into choice of law thinking, has allowed a more individualized approach to cases, and has tempered the conflictual method by injecting into it considerations of substantive justice.³⁴ As long as legislatures do not intervene, and as long as there is no consensus on a new conflictual method to replace the Restatement, the domestic method will remain the vehicle for guiding American conflicts law from revolution to maturity. To be sure, the domestic method must and can be severed from Currie's notorious forum favoritism.³⁵

Currie's confidence that the ordinary method of interpretation can pinpoint the policies underlying the competing substantive laws has been strongly questioned by a number of commentators.³⁶ To the extent it pertains to the ascertainment of forum policies, this skepticism implies a hardly justified lack of confidence in the resources of teleological interpretation.³⁷ To put it more bluntly, "[t]he most important lesson taught in the first year of law school is that an intelligent decision to apply or not to apply a legal rule depends upon knowing the reasons for the rule."³⁸ Ascertaining these reasons may not always be easy, but it is no more difficult than in ordinary domestic cases and, in any event, better than "flipping the coin."³⁹ This is not theology;⁴⁰ it is teleology. Admittedly, teleology has its limits when the rule under interpretation is that of another state, especially a foreign country. "Intra-mural

209, 415 (1971). The similarity between Currie's approach and that of the European neo-unilateralists, as well as with the theory of "rules of immediate application," is discussed more fully in S. Symeonides, *An Outsider's View of the American Approach to Choice of Law: Comparative Observations on Current American and Continental Conflicts Doctrine*, 267-89 (unpublished S.J.D. thesis, on reserve with the Harvard Law School Library, 1980).

33. Cf. Weintraub, *supra* note 5, at 630: "I do share Professor Currie's belief that the evils that had beset conflicts methodology were the result of separating the conflict of laws from the mainstream of legal reasoning; that good conflicts analysis is good legal analysis and—this is crucial—vice versa."

34. But see Kozyris, *supra* note 2, at 906: "Does it really make sense to mix substantive justice with conflicts justice?"

35. See *infra* notes 127-28 and accompanying text.

36. See, *inter alia*, Bodenheimer, *supra* note 2, at 737; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 399, 424; Hay, *supra* note 2, at 1661; Juenger, *supra* note 2, at 33-35; Reese, *supra* note 19, at 559-60; Rosenberg, *Two views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 463-64 (1967).

37. "[G]overnmental interest analysis is merely one of the many applications of teleological interpretation. It seeks to determine the pertinence [sic] of rules of law to multiple-contact cases through an analysis of the purposes behind these rules." Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law-Process*, 46 TEX. L. REV. 141, 149 (1967). For a comprehensive discussion of teleological interpretation in modern conflicts theory, see Alexander, *The Concept of Function and the Basis of Regulatory Interests Under the Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063 (1979).

38. Weintraub, *supra* note 5, at 631.

39. B. CURRIE, *supra* note 1, at 121.

40. The word theology has been used several times in this Symposium to describe Currie's normative beliefs.

speculation on the policies of other States has obvious limitations because of restricted information and wisdom."⁴¹ While shared legal tradition, language, and terminology may facilitate the ascertainment of the policies underlying the law of a sister state,⁴² there remains the problem, largely ignored by interest analysts,⁴³ of interpreting the law of a foreign country.

Less justified is the criticism of Currie's notion that, to the extent they can be established through the interpretative process, legislative purposes can help delineate the intended spatial operation of the particular rule of law.⁴⁴ While it may be true that "legislatures have no *actual* intent on territorial reach"⁴⁵ and that "policies do not come equipped with labels proclaiming their spatial dimension,"⁴⁶ it is not an "implausible,"⁴⁷ "fictional"⁴⁸ or "vain"⁴⁹ exercise—though it is admittedly a difficult one—to infer such territorial reach or spatial dimension through the resources of the interpretative process. This is what functional or teleological interpretation is all about. The vitality of that method has never depended on proof of *actual* legislative intent or ready labels.⁵⁰ To accept this elementary idea, one need not agree with Currie's theory nor with his particular inferences about the spatial reach of laws.⁵¹

41. *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411, 301 N.Y.S.2d 519, 543 (1969) (Brietel, J., dissenting). Indeed, the experience of the New York courts with guest statutes is illustrative of the problem. In *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), a New York Court of Appeals found that the policy of the Ontario guest statute was to prevent collusive suits against the host's insurer. In *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), the court found another policy behind the Colorado guest statute, *i.e.*, to grant injured parties in other cars priority over the ungrateful guest in the assets of the negligent driver. In *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), the court had to confess that its construction of the Colorado guest statute was mistaken. Finally, in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the court conceded that "further research . . . has revealed the distinct possibility that one purpose, and perhaps the only purpose of the statute was to protect owners and drivers against ungrateful guests." *Id.* at 124, 286 N.E.2d at 455, 335 N.Y.S.2d at 67. See also B. CURRIE, *supra* note 1, at 384–415, where Currie devotes 30 pages to ascertain the policy of a North Carolina statute. But see Weintraub, *supra* note 5, at 631–34 for good suggestions of how to standardize this process.

42. See Trautman, *supra* note 2, at 1618: "[W]hen . . . communities share a common legal tradition and history, as is ordinarily so with respect to many problems within the United States, it is usually not difficult to understand the policies, although local circumstances may condition the speed and direction of maturation and adaptation to new problems."

43. Like most interest analysts, see, e.g., Sedler, *supra* note 5, at 597–98 and Trautman, *supra* note 2, at 1617 n.23, Currie was exclusively preoccupied with interstate conflicts. See *infra* note 96.

44. See the criticisms of Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 399–402 and 417–23; Juenger, *supra* note 2, at 35–36; the responses of Sedler in Sedler, *supra* note 5, at 606–20; Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 *HASTINGS L.J.* 1628, 1632–35 (1981); and Weintraub, *supra* note 5, at 630–34.

45. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 393. (emphasis deleted, emphasis added).

46. Juenger, *supra* note 2, at 35.

47. *Id.*

48. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 431 ("It is a fiction to speak of 'legislative intent.'").

49. Juenger, *supra* note 2, at 35.

50. Cf. Sedler, *Reflections on Conflict-of-Laws Methodology*, *supra* note 44; Weintraub, *supra* note 5, at 630–34.

51. Professor Brilmayer is right in charging that "Currie's principles of inference were rather a product of his own normative beliefs about how certain policies *ought* to reach." Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 400. This author, for one, strongly disagrees with those inferences. But, in fairness to Currie, it should be remembered that he never tried to justify his inferences "as expressions of *actual* legislative intent regarding a statute's territorial scope." *Id.* at 393 (emphasis added). Professor Brilmayer may also be right in that what she calls "substantive intent," *i.e.*, legislative purpose as deduced in domestic cases, cannot "by itself provide a *sufficient* basis for conflict of laws decisions," *id.* (emphasis added), but only if she would agree in this italicization.

Neither should one be labelled a medieval statist for accepting the notion that the spatial reach of laws can best be determined by looking to their purpose, as long as it is understood that such determination goes at best only half way toward actually resolving a conflicts problem. The second half of the process, in which Currie's insights were much less inspiring, is to actually and rationally accommodate laws with overlapping spatial reach.

Conceding that the domestic method of interpretation is capable of producing adequate solutions to multistate problems does not, of course, mean that it is the only method. For the domestic method may well coexist with and complement the conflictual method, as it has for centuries in Europe.⁵² Traditionally, the former method enters only when the latter defaults. Currie's contribution to contemporary choice of law methodology must be confined to demonstrating the deficiencies of the particular conflictual method which had completely displaced the domestic method during the Bealian era. Once this is understood, the way will be open for building, by legislative, judicial, or academic fiat, the new conflictual method in those areas where experience permits. The domestic method will, of course, remain the gap-filler in the remaining areas, as well as the standard by which to judge the success of the new conflictual method.

III. THE CONCEPT OF GOVERNMENTAL INTERESTS

According to Currie, whenever a case falls within the spatial reach of a law as delineated by the interpretative process, the state from which that law emanates has an interest in applying it in order to effectuate the law's underlying purposes.⁵³ Despite what the term might imply, an interest is not the unilateral wish of the enacting state to apply its law in a given case. It is rather the result of the judge's evaluation of this wish in the light of factual elements which connect the enacting state with the case at hand.⁵⁴ In Currie's words, an "interest . . . is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation."⁵⁵ And in the words of one of Currie's followers, a state's interest consists in making "effective, in all situations involving persons as to whom it has responsibility

52. See, e.g., the European theories of "laws of immediate application," and "spatially conditioned substantive rules" in S. Symeonides, *supra* note 32.

53. "The court should . . . inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance." B. CURRIE, *supra* note 1, at 189.

54. See Traynor, *supra* note 18, at 124:

The concept is an old one in other areas of the law, with a respectable place in the law reports of countless jurisdictions. Its honourable history counters those who would debase it to mean identification with the partisan interest of a State involved in litigation as a party, as in actions by or against it with respect to contracts it has made, the torts of its agents, the vindication of its property rights, or the enforcement of its criminal laws. So narrow a definition ignores the objectivity that is basic to the judicial process in all litigation, regardless of whether or not it has multi-state aspects.

55. B. CURRIE, *supra* note 1, at 621. But see McDougal, *Choice of Law; Prologue to a Viable Interest-Analysis Theory*, 51 TUL. L. REV. 207, 212 (1977): "[A]n interest is not the 'product' of a policy; rather a policy reflects underlying interests. . . . Interests give rise to the promulgation of policies and not vice versa."

for legal ordering, that resolution of contending private interests the state has made for local purposes."⁵⁶ Currie's legal realist conception of law as "an instrument of social control"⁵⁷ is projected at the interstate level. Governments do have an interest in the outcome of litigation between private persons in domestic *as well as* in conflicts cases.

This idea has been strongly objected to by many commentators, most of whom have continental backgrounds, who maintain that, aside from public law matters such as currency or taxation, a state has no interest in the outcome of litigation between private persons.⁵⁸ Yet, leaving aside the unfortunate qualifier "governmental"⁵⁹ and Currie's rather awkward personification of states,⁶⁰ the public-private law distinction should not be allowed to obscure the fact that, at least in the United States, important socio-economic policies are often enunciated in the judicial rather than the executive or the legislative chambers. Therefore, one cannot deny seriously that a state like Michigan has a great deal at stake in a products liability action against one of Michigan's auto industries;⁶¹ or that the tax base of a state like Nevada would feel the impact of an adverse judicial decision in a California dram shop action against Nevada's major industry, the casino industry.⁶² Neither do foreign governments make secret their strong concerns in the outcome of American litigation involving their shipping industries.⁶³ Whether these concerns are called governmental interests or

56. Baxter, *supra* note 3, at 17.

57. See B. CURRIE, *supra* note 1, at 64:

Law is an instrument of social control. Recognition of this fact, and emphasis on the economic and social policies expressed in laws, would lead to a fresh and constructive approach to conflict-of-laws problems. But law is not an instrument of social control alone. It retains something of the quality and function that were commonly attributed to it before we became so acutely conscious of its sociological role.

58. See I. A. EHRENZWEIG, *PRIVATE INT'L LAW* 63 (1967); P. GRAULICH, *PRINCIPLES DE DROIT INTERNATIONAL PRIVE* 14 (1961); Hay, *supra* note 2, at 1660; Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 206 (1969); Kegel, *supra* note 2, at 180-82; Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 664 (1962). For responses to these arguments, see D. CAVERS, *supra* note 4, at 100 (1965); A. SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 72-73 (1970); Baade, *supra* note 37, at 148-49; Sedler, *supra* note 3, at 191-92.

59. According to Juenger, the word governmental was "chosen to reflect [Currie's] view that the pursuit of forum policies in conflict cases is a vital political endeavor with which courts should not interfere." Juenger, *supra* note 2, at 9. See also Trautman, *supra* note 2, at 1614:

Characterizing these interests as governmental ignores the fact that often the interests involved are individual interests in private ordering. Although these individual interests are respected and often nurtured by governmental authority, the emphasis on the governmental nature of the interest downplays a vast area of law making by individuals and often tends to distort the issue.

60. See Juenger, *supra* note 2, at 9: "Currie theorized that states have an 'interest' akin to a human desire." See also *id.* at n.53: "Currie ascribed human characteristics to states, postulating 'selfish' and 'blind' ones."

61. See, e.g., *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974); *In Re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981) emphasizing California's

substantial interest in the economic health of corporations [such as McDonnell Douglas Corp.] which do business within its borders . . . [California] derives substantial sales and income taxes, as well as other revenues, directly and indirectly from a corporation's activities within the state. Indeed, California's interest is strong with regard to a rule disallowing punitive damages because such a rule protects the economic well-being of the corporations and therefore enhances the economic well-being of the state.

Id. at 614. Cf. *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966); *Ciprari v. Servicas Aereas Cruzeiro, S.A.*, 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 855 (2d Cir. 1966).

62. See *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), where the California court did recognize Nevada's interests, although it eventually subordinated them to California's own interest.

63. In practically every major international maritime conflicts case that reached the United States Supreme Court, at least one foreign government, and occasionally the United States as well, filed amicus curiae briefs bringing to the

simply interests is a secondary matter, as long as their existence is recognized and as long as they are assigned a role in the calculus of the choice of law process. The traditional theory's failure to recognize these interests resulted in random sacrifice of the interests of one state without promoting the interests of the other or of a common interest of both.⁶⁴ Currie's great contribution to American choice of law thinking was that he made us aware of this anomaly and gave us the opportunity to correct it, although his own solutions were far from perfect.

In sum, Currie was correct in insisting that conflicts litigation implicates the interests of states. He was also correct in looking into the competing substantive laws in order to find these interests. Where Currie erred was in his reluctance to look to other sources for governmental interests, in his own articulation of interests, and in the way in which he resolved concrete conflicts of governmental interests. Each of these points is discussed below.

IV. CURRIE'S READING OF INTERESTS

Currie's reading of interests suffers from two different but interrelated flaws: (a) his insistence that a state is interested in protecting its own residents only but not out-of-staters, or what is referred to hereinafter as his personal law principle; and (b) his unwillingness to recognize interests other than those reflected in the domestic laws competing in a given case.⁶⁵

A. *The Personal Law Principle*

Overreacting to the Restatement's premise that laws operate territorially, Currie moved to the other extreme by adopting the medieval notion that laws follow the person.⁶⁶ To be sure, Currie was much too sophisticated to use simplistic terms of this kind; however, when the jargon is cleared away, this is the central thought that emerges.⁶⁷ In almost all circumstances, Currie deduces the legitimacy of state interests from the domicile of the parties. Furthermore, he articulates state interests

Court's attention their respective interests in the outcome of the pending litigation between shipowners and seamen. For extensive discussion of this issue and pertinent citations, see Symeonides, *Maritime Conflicts Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 224-25, 228, 247 (1982).

64. See B. CURRIE, *supra* note 1, at 191: "Traditional doctrine often requires a state to sacrifice its own interest even though the interest of no other state is thereby advanced." See also *id.* at 589-90, referring to *Milliken v. Pratt*, 125 Mass. 374 (1878): "In the case of married women's contracts, . . . application of the law of the place of contracting subverts domestic policy without advancing foreign policy in four of the fourteen possible cases, and subverts foreign policy without advancing domestic in two additional cases."

65. A third weakness is Currie's unwillingness to consider the expectations and interests of private parties except to the extent that these interests are subsumed under the interests of their respective states. See CURRIE, *supra* note 1, at 610: "I can find no place in conflict-of-laws analysis for a calculus of private interests. By the time the interstate plane is reached the resolution of conflicting private interest has been achieved; it is subsumed in the statement of the laws of the respective states." But see Currie's letter to Cavers in Cavers, *A Correspondence with Brainerd Currie, 1957-58*, 34 MERCER L. REV. 471, 488 (1983): "I shall not admit that I am unwilling to consider the claims of human beings to justice unless I can fit them into the conception of state interests."

66. See Juenger, *supra* note 2, at 9-10: "Currie resuscitated the medieval notion of a personal law, and his approach accords the domiciliary nexus a much more pervasive scope than it had ever enjoyed in Anglo-American jurisprudence." Korn, *supra* note 2, at 811: "[Currie's] system firmly links each state's interest to the fortunes of its domiciliaries."

67. "[Currie's] entire method amounts to little more than a complicated way of saying that the law of the domicile governs." Juenger, *supra* note 2, at 39.

such that each state is interested in protecting its own domiciliaries but not out-of-staters similarly situated.⁶⁸ Thus, aside from conduct-regulating laws—which operate territorially and bind or benefit everybody within the territory regardless of residence⁶⁹—protective laws follow the defendant and compensatory laws follow the plaintiff.⁷⁰ A state with a defendant-protective rule, such as the rule of contractual incapacity involved in *Milliken v. Pratt*⁷¹ and *Lilienthal v. Kaufman*,⁷² or the guest statute involved in *Babcock v. Jackson*,⁷³ has an interest in applying it to benefit resident defendants but not out-of-staters, regardless of where the contract was made or the accident occurred.⁷⁴ Similarly, a state with a pro-plaintiff law, such as a compensatory rule, has an interest in applying it to benefit its own residents only,⁷⁵ regardless of where they were injured. Nonresidents injured within the state with the compensatory law may also benefit from it, but not for their own sakes. Instead, they benefit for the sake of local medical creditors who may otherwise remain unpaid, and because of the possibility that an indigent victim may become a public ward.⁷⁶

68. Professor Sedler disputes strongly the proposition that “a state’s real interest in applying a rule of substantive law in order to implement the policies reflected in that law is limited to residents and does not extend to nonresidents.” Sedler, *supra* note 5, at 620. A closer reading of his response, however, reveals that his disputation is limited to admonitory or regulatory laws which, according to him and Currie, operate territorially “totally apart from the residence of the actor or the victim.” *Id.* at 622. Sedler does not dispute that “in the typical accident case, the relevant interests are compensatory and protective ones, and a state’s interest in applying its law in order to implement those policies indeed depends on a party’s residence in that state.” *Id.* at 621. For a fresh view of the problem of discriminating against forum nonresidents, see Weinberg, *supra* note 5, at 596–97.

69. See Currie’s discussion of traffic laws and Sunday laws in B. CURRIE, *supra* note 1, at 58–61.

70. Regulatory in this sense are all rules regulating or deterring certain kinds of conduct. Protective are all laws limiting or eliminating the defendant’s liability, such as rules imposing a ceiling on the amount of recovery, rules of intrafamily immunity, guest statutes, rules of contractual incapacity, etc. Compensatory are the laws designed to ensure, facilitate, or increase the victim’s recovery. Currie did not use these exact categories, but he did speak about the regulatory, protective, or compensatory policies of given rules of law. Currie also recognized that oftentimes more than one, and sometimes all three, of these policies may underlie a given rule of law. If so, the enacting state may be interested on more than one ground. See Sedler, *supra* note 3, at 199–200.

71. 125 Mass. 374 (1878).

72. 239 Or. 1, 395 P.2d 543 (1964). *Lilienthal* is not discussed by Currie as it was decided shortly before his death. However, like *Milliken*, *Lilienthal* involves a contract made outside the forum state by a person incapable of contracting under forum law. In both situations Currie would favor the application of the law of the forum to vindicate the forum’s interest in protecting its residents. See Currie’s discussion of *Milliken* in B. CURRIE, *supra* note 1, at 85–86:

Massachusetts . . . believes . . . that married women constitute a class requiring special protection. It has therefore subordinated its policy of security of transactions to its policy of protecting married woman. . . . What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women. In 1866 Maine emancipated (its) married women. Is Massachusetts declaring that decision erroneous . . . ? Certainly not. . . . All that happened was that in each state the legislature weighed competing considerations, with different results. Well, each to his own. Let Maine go feminist and modern; as for Massachusetts, it will stick to the old ways—for Massachusetts women.

Id.

73. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

74. See B. CURRIE, *supra* note 1, at 724: “Ontario has no interest at all in the application of its guest-statute. . . . The guest-statute expresses a policy for the protection of defendants. The defendant here, however, is not a citizen or resident of Ontario, he is a citizen of a state that holds him accountable for injuries to his guests.”

75. See Currie’s discussion of New York’s “no damages ceiling” rule involved in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), in B. CURRIE, *supra* note 1, at 691–721:

New York had no interest in applying its law and policy merely because the ticket was purchased there, or because the flight originated there. New York’s policy is not for the protection of all who buy tickets in New York, or board planes there. It is for the protection of New York people.

Id. at 705.

76. *Id.* at 145, 148, 150–51.

Currie's personal law principle creates constitutional, philosophical, and methodological problems which Currie tried to anticipate. At the constitutional level, Currie insisted that his principle is "not vitiated, but rather vindicated" by the Constitution, provided that the "pursuit of self-interest" is "rational, moderate and controlled."⁷⁷ Currie acknowledged indirectly, however, the potential for discrimination inherent in his analysis by saying that "employment of this method would give a *new importance* to . . . [the equal protection⁷⁸ and privileges and immunities⁷⁹] clauses as they affect conflict-of-laws problems."⁸⁰

Dean Ely has recently challenged the constitutionality of Currie's personal law principle, or what Ely calls the interest of states in "generat[ing] victories for their own people in a way that they are not interested in generating victories for others."⁸¹ Ely's thesis is that the principle itself, not just its discriminatory application, is unconstitutional under the privileges and immunities clause of the Constitution. If that is true, Ely says, it "spells the end of 'interest analysis' in any recognizable sense of the term."⁸² Professors Sedler and Weinberg have emphatically denied both charges.⁸³ The instructions of this Symposium's organizers prevent consideration of this issue here. It suffices to say, however, that even if Ely is wrong, a theory that advocates as much as "the market will bear constitutionally"⁸⁴ cannot expect much praise from those who believe that discretion should not be pushed to the limits of the Constitution.⁸⁵

Currie also anticipated philosophical criticisms of his personal law principle and responded vaguely by encouraging "rational altruism"⁸⁶ while condemning "irrational altruism."⁸⁷ But Currie never retreated from his basic premise that a state is

77. *Id.* at 525:

The method of approach to conflict-of-laws problems that calls for their analysis in terms of the governmental interests of the states concerned is not vitiated, but rather vindicated, by this review of the effect of the Privileges and Immunities Clause. That method counsels the rational, moderate, and controlled pursuit of self-interest; it also counsels that self-interest should be subordinated freely, and even gladly, to the constitutional restraints required and made possible by federal union. Under conventional conflict-of-laws doctrine, legal scholars, and to a lesser degree the courts under their influence, because of the compulsion of internationalist and altruist ideals, have guiltily suppressed the natural instincts of community self-interest. The impersonal choice-of-law rules that are employed in this process are themselves discriminatory at times, and at other times enforce a purposeless self-denial, or an unwarranted intrusion into the concerns of other states, or an unintended and unjustified retroactive impairment of settled rights and obligations.

Id.

78. U.S. CONST. amend. XIV, § 1.

79. U.S. CONST. art. IV, § 2, cl. 1.

80. B. CURRIE, *supra* note 1, at 185-86 (emphasis added).

81. Ely, *supra* note 2, at 173, 178.

82. *Id.* at 187.

83. See Sedler, *supra* note 5, at 620-35; Weinberg, *supra* note 5, at 596-97.

84. Hay, *supra* note 2, at 1666. See Allo, *supra* note 5, at 569, 580-81, for a view that tends to constitutionalize the law of choice of law.

85. "Even if permissible within the still too wide constitutional limits, this is not in the interest of the litigation at hand, of the legal system, or of our federal structure." Hay, *supra* note 2, at 1665-66.

86. See B. CURRIE, *supra* note 1, at 185: "The suggested analysis does not imply the ruthless pursuit of self-interest by the states." See also *id.* at 186: "There is no need to exclude the possibility of rational altruism." See also *id.* at 549: In a federal union such as ours there is no room for the cycle of discrimination, retaliation, and reciprocity. Each state may and should extend the benefits of its laws to foreigners, not merely with the hope but with the assurance that all other states will reciprocate as a matter of course.

87. See *id.* at 191: "Traditional doctrine often requires a state to sacrifice its own interest even though the interest

interested in protecting only its own citizens. According to one of his friends and corevolutionaries, such a premise "is more appropriate to a tribal system of law than to that prevailing in the American Union."⁸⁸

At the methodological level, Currie's personal law principle provides acceptable solutions to one category of conflicts in which the first Restatement was obviously deficient: cases in which both litigants are from the same state, that is "false conflicts."⁸⁹ By the same token, however, due to its emphasis on persons rather than on the "locus," Currie's personal law principle is at an impasse in two new categories of conflicts that were unknown to the traditional theory:⁹⁰ (a) cases in which the plaintiff comes from a pro-plaintiff state and the defendant from a pro-defendant state, that is "true conflicts;" and (b) cases in which the plaintiff comes from a pro-defendant state and the defendant from a pro-plaintiff state, that is the "unprovided for" cases.⁹¹ This impasse would not exist if Currie were willing to soften his personal law principle by considering broader governmental interests. Also, true conflicts would not be insolvable if Currie were to retreat from his forum favoritism and allow weighing of interests. Admittedly, concessions of this kind would markedly alter Currie's theory, but it could still bear the name of interest analysis.

Despite its obvious deficiencies, Currie's personal law principle has served American conflicts doctrine by cutting down on the omnipotence of territorialism. Although it is no longer fashionable to speak in these terms, the history of conflicts law in any other country has been marked by the perennial conflict and compromise between territoriality and extraterritoriality or personality. Only in America, thanks to Story and Beale, has territorialism enjoyed such a position of dominance. Currie's forceful advocacy of the personal law principle, though too extreme to be acceptable, has shaken the stagnant waters and has moved American choice of law thinking away from territoriality.⁹² This is by no means a small accomplishment. But it is only the beginning of the process. The right balance between the two grand principles of territoriality and extraterritoriality must still be found.

of no other state is thereby advanced. . . . The rational pursuit of self-interest is preferable to such irrational altruism." See also *id.* at 197: "Irrational altruism can be quite as mischievous and arbitrary as irrational provincialism."

88. D. CAVERS, *supra* note 4, at 151 n.29.

89. A false conflict in Currie's analysis is a case in which only one of the involved states is actually interested in applying its law. See *infra* note 112. There seems to be a consensus that cases in which both parties come from the same state should be decided by the law of that state. See, e.g., Korn, *supra* note 2, at 962. Under interest analysis, however, single domicile cases are not always false conflicts. When two parties from the same state which provides recovery are involved in an accident in a nonrecovery state, there is a false conflict and the law of the common domicile applies. When, however, two parties from a nonrecovery state have an accident in a recovery state, there is probably an "apparent conflict" (see *infra* notes 114, 115) and possibly a "true conflict" because of the accident state's policy of protecting local creditors and deterring wrongful conduct. See Sedler, *supra* note 16, at 1034-35. Despite these ambiguities, however, interest analysis achieves better results in single domicile cases than the traditional rule of *lex loci delicti*.

90. See Juenger, *supra* note 2, at 41: "Currie's major insight was that the territorially-oriented rules he attacked created 'problems that did not exist before.' It is strange that he never noticed that his personal law principle had precisely the same propensity."

91. See *infra* notes 119-23.

92. For a sample of this new thinking, see, for example, Weinberg, *supra* note 5, at 597 n.4: "[T]he legislative power of a state derives from its legitimate sphere of interest in the welfare of its residents. Those writers who . . . suppose that the state can govern events but not people seem insufficiently mindful of the essential preconditions of effective government."

B. Neglect for Multistate Interests

In searching for governmental interests Currie did not look to sources other than the competing substantive laws, nor did he recognize that the interests reflected in the domestic laws may acquire a different tenor or intensity when projected at the interstate level.⁹³ Currie refused to include in his calculus the so-called multistate interests—interests that may not be reflected directly in a state's domestic law but which stem from the state's membership in a broader community of states.⁹⁴ Despite his stated belief that "[t]he short-sighted, selfish state is nothing more than an experimental model [and that] [n]o such state exists, at least in this country,"⁹⁵ Currie specifically dismissed the view that a state should be guided in its choice of law decisions by the "needs of the interstate and international system."⁹⁶ The only restraints he recognized were those imposed by the federal constitution, but he probably violated those restraints himself by advocating his personal law principle.

Again, there is a certain inconsistency in Currie's thinking. It is common knowledge that he was working with the framework of the federal system in mind, and that he focused exclusively on interstate conflicts.⁹⁷ He attributed many of the evils of American conflicts doctrine to its international parentage⁹⁸ and pledged to work for a new doctrine closely tailored to the needs of interstate conflicts. Yet the prescriptions he proposed were essentially antifederal. His disregard of shared multistate interests, his personal law principle, and his suggestion that the forum should apply its law any time it gets a chance may be good descriptions of a cold war era in international relations, but it is hardly a good prescription for international and much less for interstate conflicts of law.⁹⁹ Currie's assurances that undue protection-

93. Compare with A. VON MEHREN & D. TRAUTMAN, *supra* note 4, at 77, 215-19, 230-32; McDougal, *supra* note 4, at 449-50:

States may have policies and interests relevant to transactions which are adverse to the forum state's intrastate policies and interests. Rather than rendering a decision which defeats the forum's own multistate policies and interests, a rational and reasonable court could decide that the long-term interests of the forum will be furthered best by the subordination of its intrastate policies. Thus, even from a parochial perspective, application of forum law may be unjustifiable.

Also compare with Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105-06 (1977).

94. See the criticisms of Hill, *supra* note 9, at 489-90; Kegel, *supra* note 2, at 180-82; McDougal, *supra* note 4, at 447-49; Rosenberg, *supra* note 36, at 464; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975); von Mehren, *supra* note 2, at 92-93. For Currie's response, see, B. CURRIE, *supra* note 1, at 186-87.

95. B. CURRIE, *supra* note 1, at 616.

96. *Id.* at 614. Continuing Currie's intransigence, Sedler insists that "[t]he purpose of conflicts law is not to further harmonious relations and to facilitate commercial intercourse between states, nor is it to promote multistate policies. It is, as I have said, to provide functionally sound results" Sedler, *supra* note 5, at 601. For a more moderate view, see Weinberg, *supra* note 5, at 598-601, 626.

97. Currie's analysis is based exclusively on interstate conflicts. Although he suggested in some footnotes that his conclusions were valid in international conflicts as well (see, e.g., B. CURRIE, *supra* note 1, at n.53, 56, 122, 190), he did not seem to give any serious thought to international conflicts. See Evrigenis, *supra* note 2, at 367-68.

98. See B. CURRIE, *supra* note 1, at 627:

We have too long supposed that conflict-of-laws problems can be solved in accordance with a code, transplanted from the continent of Europe. . . . It is time to return to methods that are indigenous to our legal system and that our judges and lawyers are fully competent to utilize by reason of their training and experience.

99. See Bodenheimer, *supra* note 2, at 738: "[Currie's] theory fosters a state chauvinism which seems strongly out of place in a world characterized by the interdependence of states and the need for mutual accommodation between them." Hay, *supra* note 2, at 1662: "Our federal structure does not justify the elevation of state law, in general, to the position of a forum's overriding 'governmental interest.'" Trautman, *supra* note 2, at 1615: "[Currie's forum favoritism] seems

ism will be curtailed by the equal protection and privileges and immunities clauses of the Constitution,¹⁰⁰ and that excessive forum favoritism will be controlled by the due process and full faith and credit clauses of the Constitution,¹⁰¹ are hardly convincing or reassuring. Firstly, it is questionable policy to first encourage protectionism and chauvinism and then to curtail it by constitutional compulsion. Secondly, as is by now pellucidly evident from *Allstate Insurance Company v. Hague*,¹⁰² the Supreme Court is moving in the opposite direction from what Currie had predicted.¹⁰³

V. NO WEIGHING OF GOVERNMENTAL INTERESTS

Currie fell into a double inconsistency when he asserted that American judges are not constitutionally empowered nor qualified to weigh governmental interests.¹⁰⁴ This thesis is inconsistent with Currie's own instrumental conception of law,¹⁰⁵ which implies an activist view of the role of the judiciary and which entails a politicization of the choice of law process. It is also inconsistent with the power Currie granted to judges at an earlier stage of his analysis, that is, in identifying and evaluating governmental interests in order to determine whether there is a true conflict.¹⁰⁶ This is no less of a delicate or political function and, if judges are qualified and empowered to discharge it, they should not lose that power the moment they encounter a true conflict.¹⁰⁷ Aside from these inconsistencies, Currie's thesis on the point presupposes a conception of the judicial process that may be agreeable to a continental scholar,¹⁰⁸

impermissible and essentially lawless in a multistate society." Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 416: "A conflicts methodology based only on favoritism for local residents would surely run counter to the established principles of the American federal system."

100. See B. CURRIE, *supra* note 1, at 123-26, 185, 191, 280, 285.

101. *Id.* at 271, 280-81. "The self interest which a state is to pursue is only its moderate and legitimate interest, and that for the states of the Union this pursuit is importantly limited by provisions of the Federal Constitution." *Id.* at 191.

102. 449 U.S. 302 (1981).

103. See generally Kozyris, *supra* note 2.

104. Currie thought it would be an "embarrassment . . . [for a court] to nullify the interests of its own sovereign" and that, in any event, the courts lack the necessary resources to choose between conflicting governmental interests. This is a "political function of a very high order . . . that should not be committed to courts in a democracy." B. CURRIE, *supra* note 1, at 182. See also *id.* at 278-79.

105. See *supra* note 57.

106. See Cavers, *Contemporary Conflicts in American Perspective*, 131 RECUEIL DES COURS 75, 148 (1970): "Weighing of interests *after* interpretation is condemned: weighing of interests *in* interpretation, condoned, not to say, encouraged." (emphasis added)

107. In Cavers' words,

Currie seems to me to invite the judiciary to perform essentially the same function he would forbid when he would allow a court in State *F* to take into account the policy of State *X* in determining whether the forum's policy should be considered in conflict with, presumably in a situation where, but for the State *X* policy, the forum's law would be applied.

Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW AND CONTEMP. PROBS. 732, 734 n.9 (1963). See also Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, *supra* note 2, at 476-77; von Mehren, *supra* note 2, at 95. Currie responds by saying that

there is an important difference between a court's construing domestic law with moderation in order to avoid conflict with a foreign interest and its holding that the foreign interest is paramount. When a court avowedly uses the tools of construction and interpretation, it invites legislative correction of error. . . . When it weighs state interests and finds a foreign interest weightier, it inhibits legislative intervention and confounds criticism.

Currie, *supra* note 17, at 759.

108. Yet even in countries like France, where strong views on the separation of powers are held, "judges have manufactured conflicts law in full view of complacent legislatures." Juenger, *supra* note 58, at 206-07.

but does not accurately portray the realities of the common law method¹⁰⁹ with which Currie associated his interest analysis so proudly.¹¹⁰ That is probably the reason why Currie had to confess that he could not cite any unqualified acceptance of his thesis on this point.¹¹¹ The same reason may explain why most of his successors have abandoned him.¹¹² In fact, the major reason the interest revolution kept going after Currie was the rejection by other scholars of this solution of despair and their pursuit of rational ways of accommodating conflicting state interests.

VI. FALSE CONFLICTS, TRUE CONFLICTS, INTERMEDIATE CONFLICTS

Currie's chief contribution to conflicts theory is his technique of identifying and resolving false conflicts.¹¹³ That this technique is by now taken for granted, even by his critics, and forms the common denominator of all current choice of law methodologies is no reason to deny him the credit rightfully due to him. Even if this were Currie's only contribution to conflicts theory, it would be sufficient to secure him a permanent position in the conflicts "Hall of Fame." Currie may also be credited with establishing and naturalizing in conflicts jargon the categories of apparent conflict, true conflict, and the unprovided-for case. When used descriptively rather than dispositively, these categories are useful in providing a common terminology and in aiding the focus of the search for appropriate solutions. Currie's own solutions to these conflicts, however, left much to be desired.

The apparent conflict is, in Currie's words, a case in which "each state would be constitutionally justified in asserting an interest, but on reflection the conflict is avoided by a moderate definition of the policy or interest of one state or the other," "a case in which reasonable men may disagree on whether a conflicting interest should be asserted."¹¹⁴ According to another definition, an apparent conflict is a conflict which appears to be a true one if all possible interests of the involved states in the abstract are considered, but which may well be a false one on closer investigation of the factual contacts and a more moderate interpretation of the policies

109. "Even since conflicts law first developed, courts did precisely what Currie would forbid them to do; no judge has ever been impeached for inventing or applying a choice of law rule that sacrifices forum interests." *Id.*; "Currie's proscription of interest-weighting seems to strike at the heart of the judicial process." Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 852-55 (1961). Currie, who was a legal realist, responded with a not so realistic statement: "I do not care whether courts undertake to weigh and balance conflicting interests or not." But when they do, "such action can find its justification in politics, not in jurisprudence. . . . [L]et us not delude ourselves with any notion that we can control or predict the process by a juridical science of conflict of laws." B. CURRIE, *supra* note 1, at 600-01. A more moderate explanation is found in *id.* at 183, 274.

110. See *supra* note 8.

111. Currie, *supra* note 17, at 758-59. See Ehrenzweig, *A Counter-Revolution in Conflicts Law?* 80 HARV. L. REV. 377, 389 (1966): "As far as I can see, all courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained." Korn, *supra* note 2, at 816: "The part of Currie's systematics that has been almost universally rejected . . . is the notion that courts should not undertake to weigh state interests."

112. It seems that only Baade has remained faithful to Currie on this point. See Baade, *supra* note 37, at 179. Sedler, who is also a faithful disciple of Currie, attempts to avoid the impasse by distinguishing "real" as opposed to "hypothetical" interests. The implication is that the "hypothetical" interests may be subject to balancing while the "real" are not. See Sedler, *supra* note 3, at 220-33.

113. See B. CURRIE, *supra* note 1, at 184. This technique is so familiar in conflicts literature that no explanation or further citation is deemed necessary.

114. Currie, *supra* note 17, at 763, 764.

involved.¹¹⁵ This category is terminologically useful, for it gives a name to the gray area lying between false and true conflicts. However, the practical utility of this category is impaired by the fluidity and manipulability of its outer limits.¹¹⁶

Currie's solution to true conflicts by the unqualified resort to the law of the forum is the most controversial feature of his analysis. It is an indefensible solution of despair. While some unrepentant interest analysts continue to feel otherwise,¹¹⁷ and while most critics continue to criticize interest analysis on this point as if there was nothing else to it, this feature of interest analysis is both severable and dispensable. Courts and commentators have already demonstrated that rational solutions to true conflicts may be found along interest analysis lines without automatically applying the law of the forum.¹¹⁸ Whether one should call this a revised interest analysis or comparative impairment may well be a matter of semantics.

The unprovided-for case is a category of conflicts cases for which Currie's theory does not provide a solution other than some tentative suggestions.¹¹⁹ Currie's neglect of this category of conflicts is due to his assumption, which later proved to be wrong, that the possibility of such cases arising in practice is very remote,¹²⁰ and also to the fact that a theory which is based exclusively on state interests has little to say when no state interests are at stake.¹²¹ To be sure, the lack of a conflict of interest may make a case easier to solve, but it does not actually solve it. The judge still must find a principled solution, and applying the law of the forum, as suggested by Currie, is hardly consistent with the basic premises of interest analysis.¹²² Inevitably, the judge's analysis must proceed beyond state interests in search for other choice

115. Sedler, *supra* note 3, at 187.

116. Currie admits this when he says that "indeed, the three classes of cases [*i.e.*, false, apparent, true] are a continuum with no clear internal boundaries" and when he says that reasonable men may disagree on an apparent conflict. Currie, *supra* note 17, at 764.

117. See, e.g., Allo, *supra* note 5; Kay, *supra* note 3; and Sedler, *supra* note 5.

118. See, e.g., D. CAVERS, *supra* note 4, at 139-81; Weinberg, *supra* note 5; Weintraub, *supra* notes 5 and 22; Baxter, *supra* note 3. See also Martin, *An Approach to the Choice of Law Problem*, 35 MERCER L. REV. 583 (1984).

119. The unprovided for case is the converse of a true conflict in the sense that, in this case, no one of the involved states wants to have its law applied. Currie did not develop any definite solution for this case. He dealt with it primarily in the context of unconstitutional discrimination, *i.e.*, whether it is constitutionally permissible for the forum to refuse to extend the benefit of its law to a nonresident litigant. On the choice of law aspect he only gave some tentative suggestions which he finally rejected in favor of applying the law of the forum "since no good purpose will be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law." B. CURRIE, *supra* note 1, at 156; see also *id.* at 152-56. Thus Currie, who for the first time appears sensitive to the problems of the overburdened courts in ascertaining foreign law, is willing to relieve them from this burden in at least one category of cases. The trouble is, however, that, under the terms of his analysis, the courts must first ascertain not only the content, but also the policies, of the foreign law before they can conclude that the foreign state is not interested in applying its law.

120. The unprovided for cases have been far more numerous and far more difficult than Currie had anticipated. See, *inter alia*, such textbook favorites as *Hurtado v. Superior Court*, 11 Cal. 3d 575, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973); *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 385 N.Y.S.2d 64 (1972). But see Weintraub, *supra* note 5, at 644-46.

121. According to Professor Twerski, "the entire structure of interest analysis crumbled" in the unprovided for case. "Having defined the interests as domiciliary oriented, when you run out of domiciliaries to protect you run out of interests." Twerski, *supra* note 2, at 108. Equally responsible for this impasse is Currie's single-minded, one dimensional reading of interests evidenced by his unwillingness to consider interests other than those reflected in the domestic laws of the involved states. See *supra* notes 94 and 96.

122. According to McDougal, this solution "makes almost no sense. It is a complete abandonment of interest analysis. If interests are the important factors at stake in choice-of-law controversies, as they are, then they should be the critical factor in the resolution of all choice-of-law controversies, not simply some." McDougal, *supra* note 4, at 440 n.7.

considerations that Currie did not consider. In this respect, Sedler's ideal of focusing on the common policies of the involved states is indeed a valuable suggestion.¹²³

Finally, Currie seems to fall into another inconsistency when, in dealing with the true conflict before a disinterested forum, he proposes as one solution that the court decide the case "by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body."¹²⁴ It is difficult to see how the courts, which in Currie's view are unqualified to weigh governmental interests, are now capable of performing that supreme task. Moreover, it is also difficult to see why Currie, who had specifically decried a "better-law" approach¹²⁵ in any other true conflict, is now willing to trust the judge's preference.¹²⁶

VII. FORUM FAVORITISM

The law of the forum dominates Currie's analysis for two reasons: first, because he begins with the basic presumption that forum law should be applied as a matter of course, and that only if good reason is shown should the judge consider applying a law other than his own;¹²⁷ and, second, because Currie would apply forum law in all cases in which the forum has an interest, even though not the stronger one. In effect, Currie would apply foreign law only in one category of conflicts—a false conflict in which the forum is not interested. In all other cases he would apply the law of the forum—(a) in a false conflict in which the forum is the interested state; (b) in a true conflict in which the forum is one of the interested states; (c) in the unprovided-for case; and (d) even in a true conflict before a disinterested forum, if the court cannot dismiss on forum non conveniens grounds.¹²⁸

Currie justified his forum favoritism with arguments which ranged from the practical to the philosophical.¹²⁹ Although he easily convinced some judges,¹³⁰ he

123. According to Sedler, "usually the point as to which the laws of the involved states differ will involve a substantive rule that is an exception to the common policy reflected in what may be called the general law of both states. Since the state whose law represents an exception to that common policy has no interest in having its law applied . . . it is submitted that the common policy should come to the fore, and the exception should not be recognized." Sedler, *supra* note 3, at 235. In a case like *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the Ontario guest statute would be the exception to the general compensatory policy of both Ontario and New York. Since Ontario is not interested in applying its guest statute, since no Ontario host was involved, "the common policy of both states in favor of recovery should prevail." Sedler, *supra* note 3, at 235. Sedler's suggestion may provide good practical solutions for those unprovided for cases that can fit the above factual pattern, but it does not remedy the theoretical deficiencies of interest analysis in the unprovided for case. For a critical appraisal of Sedler's effort to reformulate interest analysis, see McDougal, *supra* note 122.

124. E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 447-48 (5th ed. 1964).

125. See B. CURRIE, *supra* note 1, at 104-06, 154 n.82; Cavers, *supra* note 65, at 488.

126. Currie's neglect of this category of conflicts is also owed to his assumption that they are extremely rare. See Currie, *supra* note 17, at 765, 773. Even though this assumption is now reinforced after *Shaffer v. Heitner*, 433 U.S. 186 (1977), which imposes more limits on transient jurisdiction, the possibility of more such conflicts, particularly in interstate conflicts, should not be considered so remote. See *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

127. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *supra* note 124. This peculiarly American presumption antedates Currie's theory, see, e.g., Cook, *supra* note 31, and has many followers today. See, e.g., Martin, *supra* note 118.

128. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *supra* note 124.

129. See, e.g., B. CURRIE, *supra* note 1, at 89, 93-94, 191, 197, 278-80, 323, 447, 489-90, 592, 627, 697.

130. See, e.g., *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964): "We should apply that choice-of-law rule which will 'advance the policies or interests of' Oregon. . . . Courts are instruments of state policy." *Id.* at 549; Foster

was justifiably attacked by most commentators.¹³¹ In response to this criticism, Currie tried to mitigate his position in later writings by calling for a "restrained and enlightened interpretation" of the law of the forum.¹³² He did not, however, modify the basic premises of his theory, especially his view that the courts are not the proper organs to weigh governmental interests. It goes without saying that such forum favoritism rewards the forum shopper and runs contrary to the fundamental objectives of private international law. The constitutional restraints relied upon by Currie to curtail the forum favoritism generated by his theory have not in fact operated. The indirect preventive mechanism of *Shaffer v. Heitner*¹³³ is also largely ineffectual since a plaintiff usually has more than one forum from which to choose. There remains the question of whether forum shopping and the concomitant sacrifice of uniformity is a fair price to pay in exchange for attaining other goals of the choice of law process such as equity, flexibility, and justice of the end result. The answer, of course, depends on whether one believes that these other goals are any closer to being achieved today than they were before the advent of interest analysis.

VIII. IN LIEU OF CONCLUSIONS

It has been aptly observed that Currie's "seductive style" has "hypnotized a whole generation of American lawyers,"¹³⁴ and, one might add, in the same way as the teachings of Professor Joseph Beale had indoctrinated the previous generation. Indeed, if Currie's objective was to purge American choice of law thinking from Bealian theology, he has accomplished that too well. If his objective was to establish his own new rigid orthodoxy, he has fortunately failed, although probably not as badly as his critics would like. Fortunately, however, the development of American conflicts doctrine does not stop with Currie, as it did not stop with Beale. Even Beale must have known this in 1935 when, in a context more general than conflicts, he wrote:

The whole history, then, of law is the history of alternate efforts to render the law more certain and to render it more flexible . . . [T]o a period of strict law, where the one purpose of law is to secure exactness and certainty, succeeds a period of equity and natural law in which the purpose is to infuse law with an element of justice and morality and therefore to temper the exactness of the strict law with a flexibility that may enable it to perform its function more justly. This in turn is succeeded by a period of maturity in which the flexibility of the period of equity and natural law is to a degree restrained by legalizing the broadness of equitable relief and bringing that too under precepts consisting of

v. Leggett, 484 S.W.2d 827 (Ky. 1972). Professor Juenger offers many interesting explanations of why interest analysis is attractive to many judges. Firstly, "[t]he forum bias of interest analysis frees courts from the chore of having to ascertain and apply some law to which they are not accustomed." Secondly, the pro-plaintiff or pro-recovery bias inherent in interest analysis enables courts to strengthen "the protection of multistate accident victims by filtering out substandard tort rules." Juenger, *supra* note 2, at 46. One may add that precisely the same reasons explain the appeal of Leflar's "better law approach" which attracts Juenger's sympathies.

131. See von Mehren, *supra* note 2: "Currie's analysis, which compels him to give to the forum's law such broad effects, would tend to fasten upon the international and the interstate communities . . . a legal order characterized by chaos and retaliation." *Id.* at 97. See also the authors cited, *supra* note 2.

132. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *supra* note 124; Currie, *supra* note 17, at 757.

133. 433 U.S. 186 (1977).

134. Korn, *supra* note 2, at 812.

standards and principles so as to make it more certain. It is to be noticed that in this period the law does not go back to its earlier exactness, but remains with a more flexible content than the strict law, although it has gained in certainty over the period of natural law. This in turn is followed by a period in which again the freer administration of law is emphasized; a period in which we now live, where the rules and principles of law cause impatience if too fixed in their application, and a desire exists to individualize their operation. This is a period where the extreme flexibility of the period of equity and natural law is not reached for each successive period has left its touch on the law.¹³⁵

All that this statement needs to accurately describe the development of American conflicts law in this century is some updating. Due mostly to the asphyxiating nature of Beale's own system, the "impatience" of which he spoke exploded into a revolution, which in turn has been eventually succeeded by a "period of maturity." This is the "period in which we now live." Our challenge is to bring that maturity "under precepts consisting of standards and principles so as to make it more certain;"¹³⁶ to regain, in other words, the certainty lost in the revolution by producing new choice of law rules without the "exactness" and arbitrariness of Beale's rules, and without the excesses of Currie's revolution. Thanks mostly to Currie, the arbitrariness of Beale's system need no longer be demonstrated. Thanks to Currie's critics, and hopefully to this Article, the excesses of Currie's approach should by now be equally clear. But, as this Article has attempted to demonstrate, there is still enough raw material in this approach which may be used in building the new system and making it "an instrument, however imperfect, of interstate and international mutual justice."¹³⁷ In this effort, the survival of interest analysis as a self-contained, self-sufficient methodology is really of secondary importance. For, as the courts have demonstrated, appropriate results may be reached even when diverse academic theories are merged together in an amalgam not recognizable by their authors.¹³⁸ But, if interest analysis is to be buried and forgotten, it should be for the right reasons. If it is to be abandoned because of its exceedingly combative nature and its notorious forum favoritism, we would be moving in the right direction of restraining this epidemic of state antagonism which has little place in a federal system. But if interest analysis is to be abandoned because "policies do not come equipped with labels proclaiming their spatial dimension,"¹³⁹ or because "it is a fiction to speak of, 'legislative intent,'"¹⁴⁰ then we would be turning the clock back to 1935. As shown by the above quoted excerpt, even Beale did not expect this.

135. J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 50 (1935).

136. *Id.*

137. Kozyris, *supra* note 2, at 906.

138. For a good example, see *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) merging together the approaches of Currie, Baxter, Cavers, von Mehren & Trautman, Freund, and even Leflar.

139. See Juenger, *supra* note 46 and accompanying text.

140. See Brilmayer, *supra* note 48.